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Supreme Court of the United States

October Term, 1962

No. 56

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION and GENERAL MOTORS CORPORATION, *Petitioners,*

and

THE UNITED STATES OF AMERICA

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrs., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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No.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION AND GENERAL MOTORS CORPORATION,

Petitioners,

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v.

ROBERTA BARRACK, ADMX., ETC., ET AL.,
SIDNEY W. POPKIN, ET AL.,
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, The Honorable Francis L. Van Dusen, Eastern Air Lines, Inc., Lockheed Aircraft Corporation and General Motors Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The Opinion of District Judge Van Dusen directing transfer of 45 civil actions from the Eastern District of Pennsylvania to the District of Massachusetts pursuant to Section 1404(a) of the Judicial Code is reported *sub nom. Popkin et al. v. Eastern Air Lines, Inc., et al.*, at 204 F. Supp. 426 (E. D. Pa. 1962) and is printed in Appendix A to this Petition. The Opinion of Circuit Judges Staley, Forman and District Judge Lane of the United States Court of Appeals for the Third Circuit directing that the order be vacated is not yet reported but is printed in Appendix B to this Petition.

JURISDICTION.

The Writ of Mandamus directing the District Court to vacate and set aside its order of transfer was issued on December 14, 1962 (Appendix C, p. 32a), in accordance with the Court's order entered on December 7, 1962 (Appendix C, p. 30a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where 114 actions arising out of the accident here involved have been instituted in the District of Massachusetts where the accident occurred, that being the only district in which all requirements of venue and jurisdiction might have been met as to all defendants, and the District Court having determined that 45 wrongful death and personal injury actions instituted against four of the same defendants in Pennsylvania should be transferred to Massachusetts for the convenience of witnesses and in the interest of justice, does plaintiffs' failure in some of these wrongful death actions to apply for ancillary appointments as personal representatives in Massachusetts foreclose that district from being a district where these wrongful death actions "might have been brought" within the meaning of Section 1404(a) of the Judicial Code?

STATUTE INVOLVED.

Section 1404(a) of the Judicial Code, 28 U. S. C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

On April 6, 1962, petitioner, The Honorable Francis L. Van Dusen, entered an order of transfer in accordance with Section 1404(a) of the Judicial Code, having found that transfer to the District of Massachusetts would be for the convenience of witnesses and in the interest of justice. This order directed transfer of 45 actions brought by respondents in the United States District Court for the Eastern District of Pennsylvania against petitioners, Eastern Air Lines, Inc., Lockheed Aircraft Corporation and General Motors Corporation and against the United States of America. Jurisdiction is based on diversity of citizenship and, as to the United States, on the Federal Tort Claims Act. The plaintiffs below, the present respondents, petitioned the Court of Appeals for the Third Circuit for Writs of Mandamus or Prohibition. The defendants were permitted to intervene in the Court of Appeals in opposition.

Since some of the personal representative plaintiffs had not applied for ancillary letters in Massachusetts, the Court of Appeals held that those wrongful death actions which were properly commenced in Pennsylvania might not originally have been brought in Massachusetts and therefore could not now be transferred to Massachusetts. The Court ruled, however, that the order was proper as to the three wrongful death actions in which venue was improper in

the Eastern District of Pennsylvania. In two of these three actions, plaintiffs had not applied for Massachusetts appointments, but the Court nevertheless said that these two cases must be transferred to Massachusetts (Appendix B, p. 29a). Apparently, it concluded that Massachusetts was a district in which the actions "could have been brought" under Section 1406(a), although it was not a district in which they "might have been brought" under Section 1404(a).

The circumstances giving rise to this decision, which virtually nullifies the provisions of one of the principal transfer statutes and threatens to curtail the application of the other, are as follows:

On October 4, 1960, a Lockheed Electra aircraft operated by Eastern Air Lines, Inc. crashed into Boston Harbor shortly after take-off. As a result, one hundred and fourteen separate suits are now pending in the Massachusetts District Court; and in the Eastern District of Pennsylvania, forty wrongful death and five personal injury actions.[1] Eastern, Lockheed, General Motors and the United States are defendants in both courts. In some of the Massachusetts suits, the Massachusetts Port Authority is also a defendant. The three corporations which are defendants in Pennsylvania are subject to suit in both districts. However, due to the venue provisions of the Federal Tort Claims Act and the location of the Massachusetts Port Authority, Massachusetts is the only district in which all of these actions might be maintained against all five defendants.

Motions to transfer to the District of Massachusetts each of the forty-five Pennsylvania suits were filed by defendants pursuant to Section 1404(a) of the Judicial Code. Following extensive oral argument and careful consideration of the briefs, affidavits and other matters submitted by the parties, Judge Van Dusen on April 6, 1962 filed an

1. A number of plaintiffs in both courts instituted separate suits against one or more of the defendants.

opinion and entered an order granting the motions, having found that such a transfer would be for the convenience of witnesses and in the interest of justice.

Judge Van Dusen found, inter alia, that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability; that consolidation of the actions pending in Pennsylvania with those in Massachusetts for purposes of proceedings before trial is likely to produce more fair and orderly trials for all litigants and to save needless time and expense to the public, including jurors, and other litigants whose cases are awaiting trial; and that consolidation of all these cases will result in the conduct of fewer trials on the issues of liability, thereby avoiding the economic waste involved in duplicating litigation and the risk of inconsistent results as to liability (Appendix A, pp. 4a-12a, 18a-19a).

In issuing the writ the Court of Appeals did not dispute these findings. It held only that Section 1404(a) did not authorize such a transfer where plaintiffs did not have a right to sue without ancillary appointment in Massachusetts even though the Court conceded it was "quite likely" that they would have been appointed had application been made (Appendix B, p. 28a). In resolving this issue against transfer, the Court of Appeals relied on this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335 (1960) (Appendix B, pp. 26a-27a). The District Court had resolved the issue in favor of transfer relying on this Court's later decision in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960) (Appendix A, p. 21a).

REASONS FOR ALLOWING THE WRIT.

I. The Decision Below Nullifies an Important Federal Procedural Statute in Disaster, Death and Other Litigation Involving Fiduciaries as Parties.

Section 1404(a) was enacted by Congress to reduce "wastefulness of time, energy and money", and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense" arising from duplicating litigation in multiple districts. *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 26, 27 (1960). The reasons expressed by the District Court for the transfer of these cases serve precisely this design. The Court of Appeals held that this design could not be given effect in these cases because of wholly unrelated matters of state law and of a supposed state policy. Contrary to the intention of Congress, this decision renders Section 1404(a) unavailable in large classes of cases in which the convenience of parties, witnesses and the interest of justice may well be served by transfer as in the cases at bar.

The provisions of Section 1404(a) are particularly important to the administration of the federal courts in wrongful death and related litigation arising from disasters such as mass-transportation accidents and explosions. In this type of litigation, of which the cases at bar are excellent examples, the facts determinative of liability in all claims must be established by substantially the same witnesses, even though some of the claims may be for death, others for personal injury, and still others for property loss. In such cases, vast economies can be effected in judicial time and effort as well as in that of numerous members of the public serving as witnesses, jurors and advisors to the litigants by consolidating the cases in one district for pre-trial procedures and for the trial of liability issues.

The ruling of the Court of Appeals renders the provisions of Section 1404(a) virtually inapplicable to this class of case where its availability is most important. Under this ruling, potential transferee districts are limited to those few jurisdictions located in the seven states which permit a foreign fiduciary to obtain judgment in wrongful death actions by virtue of his foreign appointment.[2] Of the remaining forty-four of the fifty-one jurisdictions, twenty-three require the foreign fiduciary to obtain ancillary appointment in connection with suits under the state's wrongful death act,[3] nineteen require other affirmative pre-

2. Arizona, Ariz. Rev. Stat. Ann. § 12-612 (1956); Delaware, Del. Code Ann. tit. 12, § 1561 (1953); Iowa, *Gross v. Hocker*, 243 Iowa 291, 51 N. W. 2d 466 (1952); Michigan, *Siverling v. Lee*, 90 F. Supp. 659 (D. C. Mich. 1950); *Cardor v. Marhoff*, 143 F. Supp. 920 (D. C. Mich. 1956); Missouri, *Demattei v. Missouri-Kan. Tex. R. R.*, 345 Mo. 1136, 139 S. W. 2d 504 (1940); New Mexico, *Henkel v. Hood*, 49 N. M. 45, 1956 P. 2d 790 (1945); Wisconsin, *Robertson v. Chicago, St. P. M. & O. R. R.*, 122 Wisc. 66, 99 N. W. 1135 (1904).

3. Alaska, Alaska Comp. Laws Ann. § 61-3-2 (Supp. 1958); California, Cal. Civ. Prac. Code § 1913; Prob. Code §§ 360, 362, 400, 405, 407, 420 (1956); Connecticut, Conn. Gen. Stat. Ann. § 52-21; § 45-208 (1960); Hawaii, Hawaii Rev. Laws § 317-9 (1955); Idaho, Idaho Code Ann. § 15-220, 222, 317 (1948); Kentucky, Ky. Rev. Stat. § 394.150, § 395.005 (1955); Maine, Me. Rev. Stat. Ann. Ch. 154, §§ 14, 15, 17, 62 (1954); Maryland, Md. Ann. Code art. 93, §§ 45, 57, 368 (1957); Massachusetts, Mass. Gen. Laws Ann. ch. 191, § 5; ch. 192, §§ 4, 5, 9, 11 (1955); Montana, Mont. Rev. Code Ann. §-91-1001 (Supp. 1961); § 91-1002, 1301, 1302, 1405 (1949); Nevada, Nev. Rev. Stat. § 136.260, § 138.020, § 139.010 (1961); North Carolina, N. C. Gen. Stat. § 28-8 (1950); § 28-186 (Supp. 1961); § 31-23, 27 (1950); Oregon, Ore. Rev. Stat. § 115.160, 190, 410 (1961); Rhode Island, R. I. Gen. Laws Ann. § 33-7-18, 21; § 33-8-7; § 33-18-9 (1957); South Carolina, S. C. Code § 19-281 (1952); § 19-591 (Supp. 1962); Tennessee, Tenn. Code Ann. § 30-105, 106; 32-501 (1955); 35-610 (Supp. 1960); Texas, Tex. Prob. Code §§ 78, 95, 105 (1956); Utah, Utah Code Ann. § 75-3-22, 23, 24; 75-3-15; 75-4-4 (1953); Vermont, Vt. Stat. tit. 4, ch. 313; tit. 14, ch. 902 (1958); tit. 14, ch. 904 (Supp. 1961); Virginia, Va. Code Ann. § 26-59 (Supp. 1960); § 64-88 (1949); Washington, Wash. Rev. Code § 11.20.090, § 11.28.010; § 11.36.010 (1951); West Virginia, W. Va. Code ch. 41, art. 5, § 4073; ch. 44, art. 5, § 4207 (1961); Wyoming, Wyo. Stat. Ann. § 2-52, 68, 95, 106 (1959).

liminary acts, such as filing of foreign letters, appointing a resident agent for service of process and filing bond,[4] and two [illegible] not permit suit in the name of the fiduciary.[5] Of the same fifty-one jurisdictions, only one permits the foreign fiduciary to obtain a judgment by virtue of his foreign appointment in actions other than for wrongful death,[6] thirty require the foreign fiduciary to obtain ancillary appointment,[7] and twenty require other affirmative preliminary acts such as filing of foreign letters, appointing a resident agent for service of process and filing bond.[8]

4. Alabama, Ala. Code tit. 61, § 151 (1960); Arkansas, Ark. Stat. § 27-805 (repl. vol. 1962); District of Columbia, D. C. Code Ann. § 20-504, 505 (1961); Florida, Fla. Stat. § 734.30 (Supp. 1961); Georgia, Ga. Code § 113-2401, 2402, 2403, 2405 (1933); Illinois, Ill. Rev. Stat. ch. 3, § 265.416 (1961); Indiana, Ind. Ann. Stat. § 7-752 (repl. vol. 1953); Kansas, Kan. Gen. Stat. Ann. § 59-1707, 1708 (1949); Minnesota, Minn. Stat. § 573.05 (1947); Mississippi, Miss. Code Ann. § 622 (1957); Nebraska, Neb. Rev. Stat. § 30-303, 807 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 553:14 (1955); *Ghilain v. Couture*, 84 N. H. 48, 146 Atl. 395 (1929); New Jersey, N. J. Rev. Stat. § 3A:12-7 (1953); New York, N. Y. Surr. Ct. Act. §§ 159, 167 (1953), § 160 (Supp. 1961); North Dakota, N. D. Rev. Code § 30-11-03, 19; § 30-24-18 (1960); Ohio, Ohio Rev. Code Ann. § 2109.04; § 2113.75 (1954); Oklahoma, Okla. Stat. tit. 58, § 262, § 171-88 (1937); Pennsylvania, Pa. Stat. tit. 20, § 320.1101 (Supp. 1961); South Dakota, S. D. Code § 35.0902 (Supp. 1960).

5. Colorado, Col. Rev. Stat. Ann. § 41-1-1, 2 (1953); Louisiana, La. Civ. Code Ann. art. 2315 (West Supp. 1961).

6. Delaware, Del. Code Ann. tit. 12, § 1561 (1953).

7. In addition to those jurisdictions referred to in footnote 3, *supra*, the following States require the foreign fiduciary to obtain ancillary appointment in actions other than for wrongful death; Arizona, Ariz. Rev. Stat. Ann. § 14-341, 342 (1956); Iowa, Iowa Code § 633.33, 34, 45, 50 (1950); Louisiana, La. Code Civ. Proc. Ann. arts. 3081, 3097 (West 1961); La. Civ. Code Ann. art. 1596 (West 1952); La. Rev. Stat. Ann. § 9:2401, 2421, 2422, 2423 (1951); Michigan, Mich. Stat. Ann. § 27.3178 (98), (100), (278) (1943); Missouri, Mo. Rev. Stat. § 473.117, 667; § 474.380 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 551:5; § 553:5; §554:28 (1955); New Mexico, N. M. Stat. Ann. § 31-1-4, 5, 6; § 312-1 (1954).

8. The jurisdictions requiring other affirmative preliminary acts in actions other than for wrongful death are the same as those referred

Thus the extent to which Section 1404(a) would be circumscribed by the ruling of the court below is readily apparent.

The practical effect of the ruling is not limited to death claims in the usual context of disaster litigation. Although the ruling raises no bar to the transfer of other claims, the advantages to be derived from their consolidation with other suits pending in the transferee district will no longer be available since the death cases must in any event remain in the inconvenient transferor district. Thus in the present cases, for example, the Court of Appeals has urged the District Court to reconsider its order transferring the personal injury claims, in view of the Court's ruling with respect to the death cases (Appendix B, p. 29a).

The Court's ruling is equally restrictive of transfer in any case in which other fiduciaries are parties because the appointment of any fiduciary generally has no effect outside the jurisdiction making the appointment.

The increased cost of litigation which the Court's ruling will create will be borne not only by large corporations, but by individuals as well, such as those involved in accidents of automobiles or private aircraft. It will also be borne by the United States, which, under the Federal Tort Claims Act, may be sued in any state in which the plaintiff resides. The savings to be effected by consolidating duplicating litigation in one district is particularly important to it as a litigant. Perhaps of greatest public importance will be the inability of district judges, as a result of the Court's ruling, to utilize Section 1404(a) to alleviate the burdens on the federal judicial system which duplicating litigation needlessly imposes.

There is no reason discernible in federal policy for barring transfer of these types of litigation to convenient forums. By Section 1404(a) Congress merely restricted transfer to a district in which the action "might have been

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to in footnote 4, *supra*, with the following changes: add, Colorado, Col. Rev. Stat. Ann. § 152-6-7, 8 (1953) and Wisconsin, Wisc. Stat. § 287.16 (1958); delete, New Hampshire.

brought". The use of this language indicates that Congress intended only that the requirements of venue and jurisdiction be met in the transferee district because Congress used similar language in designating the District of Massachusetts as a district in which this type of litigation may be brought under the venue provisions of the Judicial Code (28 U. S. C. § 1391(a), (c) and § 1402(b)). Indeed, most federal venue statutes contain the phrase "may be brought" in defining the districts in which venue is proper.[9] Since these actions "may be brought" in Massachusetts, it is plain that they "might have been brought" there under Section 1404(a).

Instead of interpreting the "might have been brought" requirement in accordance with the Acts of Congress designating the districts in which litigation of this type may be brought, the Court has limited transferee districts in representative suits to those made possible by the few state legislatures which have authorized a foreign personal representative to sue without obtaining ancillary appointment or otherwise complying with local law. Although the Court recognized that its ruling would curtail the application of Section 1404(a), it said it could not presume that Congress intended to alter state policy by permitting transfer of representative suits to federal courts sitting in those states which do not permit a personal representative to bring suit by virtue of a foreign appointment. By this ruling, state legislatures become the arbiters of the extent to which Acts of Congress governing procedure in federal district courts are effective. The ruling permits state fiduciary law to provide a shelter for litigation in costly and inconvenient forums and to prevent the utilization of the statutory procedure provided by Congress to test plaintiff's choice of forum.

The decision, however, actually fails to serve state policy. The policy of Massachusetts in particular discloses liberality in permitting a foreign personal representative

9. See, *e.g.*, 28 U. S. C. §§ 1391(a) and (b), 1392, 1393(b), 1395(d), 1396, 1397, 1399, 1400(b).

who has brought suit in Massachusetts to obtain an ancillary appointment in Massachusetts and to amend his complaint even after the statute of limitations has run. *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944). It therefore can hardly be said that the policy of that state is to foreclose its courts to foreign personal representatives merely because they failed to apply for ancillary appointment prior to the institution of suit.

The reasoning of the Court in concluding that no transfer can be made under Section 1404(a) may be equally restrictive of transfer under Section 1406(a). It provides as follows:

> "The district court of a district in which is filed a a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it *could have been brought*." (Emphasis supplied.)

Since transfer is authorized only to districts in which the action "could have been brought," personal representatives who institute suit in a jurisdiction in which they mistakenly believe the defendant to be subject to suit will, under logical application of the Court's ruling, have their suit dismissed rather than transferred to a proper district. If the requirement that the actions "might have been brought" in the transferee district is not met, it is plain that the actions "could" not have been brought there. Such a dismissal, rather than transfer, would be directly contrary to the result which Congress intended in enacting Section 1406(a). *Goldlawr, Inc. v. Heiman*, 369 U. S. 463 (1962). The Court of Appeals, however, failed to apply its own logic, in that it permitted transfer of two of these cases, where venue was improper and plaintiffs had not applied for ancillary letters in Massachusetts, even though under its own reasoning they could not have been brought in Massachusetts.

The Court of Appeals' interpretation of the "might have been brought" requirement nullifies the provisions of 1404(a) in death and disaster litigation and threatens to

curtail the application of 1406(a). The Court of Appeals has reached this result by subordinating the federal policy of transfer to state law and a supposed state policy. This Court should therefore review the decision of the court below.

II. The Decision Below Misconstrues and Conflicts in Principle With Applicable Decisions of This Court.

In holding that the District Court was not empowered by Section 1404(a) to transfer the wrongful death actions to the District of Massachusetts, the Court of Appeals declared that this Court's decision in *Hoffman v. Blaski*, 363 U. S. 335 (1960) "compels the conclusion that respondent was without power to transfer these actions" (Appendix B, p. 26a). But contrary to the decision below, it is plain that *Hoffman v. Blaski* contains no justification for such a result. In fact, the Court's opinion conflicts in principle with that decision and with other decisions of this Court.

This Court consistently has rejected restrictive constructions of transfer statutes, based upon irrelevant or inapplicable legal principles, which would frustrate the procedural reforms desired by Congress. In *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960), libellant attempted to avoid transfer by invoking admiralty concepts relating to actions *in rem*. His suit was brought both *in rem* against the barge and *in personam* against the barge owner. This Court held that the action "might have been brought" in the transferee district, notwithstanding the fact that plaintiff would have been unable to commence suit *in rem* against the vessel in the transferee district. In so holding, this Court said that a common sense interpretation of Section 1404(a) was necessary because the interpretation urged by plaintiff "would practically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned." 364 U. S. 19 at 24. This Court noted that it had not hesitated in the past to refuse to apply this technical distinction "in a way which would cut down,

as it would here, the scope of congressional enactments" (364 U. S. 19 at 23-24), and said that Section 1404(a) "should not be made ambiguous by the importation of irrelevant fictions". 364 U. S. 19 at 26.

The same position was taken by this Court in interpreting Section 1406(a) in *Goldlawr, Inc. v. Heiman*, 369 U. S. 463 (1962). There it was urged that traditional conceptions of personal jurisdiction barred transfer. This Court held that this body of law was irrelevant to the congressional purpose to permit transfer where plaintiff had filed suit in a jurisdiction in which defendant may raise technical objections to suit. The Court said:

> "It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired." 369 U. S. 463, 467.

The ruling of the Court of Appeals squarely conflicts with the broad principle of these cases. Instead of being guided by the language and the purpose of Section 1404(a), it has engrafted on it a restriction arising from state law pertaining to fiduciaries and administration of estates which is wholly irrelevant to the reforms which Congress intended.

These actions "might have been brought" in Massachusetts in any sense which Congress may have intended. Since venue would have been properly laid and personal jurisdiction could have been acquired over each of the defendants in Massachusetts, the requirements of the statute and of *Hoffman v. Blaski*, 363 U. S. 335 (1960), are plainly satisfied. That decision holds only that the statute bars transfer when "the defendant legally could not have been subjected to suit there at the time when the case was originally filed." *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 22 (1960).

In addition, since Massachusetts courts admittedly would have entertained claims for the wrongful death of plaintiffs' decedents, it is immaterial whether or not they would have been enforceable in Massachusetts by the present plaintiffs as opposed to some other fiduciary duly qualified in Massachusetts. The statute does not require that these wrongful death claims be enforceable in the transferee district by the same nominal plaintiffs who brought suit in the transferor district. Indeed, there is no reason for such a requirement. Under Massachusetts law, wrongful death claims are enforceable only by personal representatives who are nominal parties having no interest in the damages recoverable. Further, in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 26 (1960), this Court said:

> "The idea behind § 1404(a) is that where a 'civil action' to vindicate a wrong—*however brought in a court*—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court." (Emphasis supplied.)

But even if the statute can be construed to require that the actions be brought in Massachusetts by the same nominal plaintiffs who instituted suit in Pennsylvania, it was well within their power to proceed in Massachusetts had they desired to do so. All that would have been required was the presentation of a petition for administration in compliance with routine formalities [10] either before or after suit was instituted.[11] The panel acknowledged that "it is quite likely" that such appointments could have been obtained. The best evidence of this is that plaintiffs in

10. Mass. Gen. Laws Ann., Chapters 193, 194 and 195, § 8.

11. If done after the institution of suit, the complaint could be amended to aver capacity even after the statute of limitations has run. *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944).

three of the Pennsylvania death actions,[12] who are citizens of Pennsylvania with Pennsylvania domiciliary appointments, did obtain ancillary appointments in Massachusetts. They brought suits in that district against three of the defendants,[13] having brought suit against the fourth, Eastern Air Lines, Inc., in the Eastern District of Pennsylvania.

The Court's decision also conflicts with the principle that Section 1404(a) should not be so interpreted as to give one party a greater right of forum selection than the other. In *Hoffman v. Blaski*, 363 U. S. 335 (1960), this Court held that a district in which venue and personal jurisdiction were lacking was not a district in which the action "might have been brought." This Court observed that to hold otherwise would be inequitable and discriminatory in that a defendant could obtain transfer to a district in which plaintiff could not have proceeded in the first instance without defendant's consent. 363 U. S. 335; 344. Similarly, in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960), one of the reasons advanced for rejecting the restrictive interpretation urged was that its

12. *Doris A. Laister, as Executrix of the Estate of Chester H. Laister, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 29724; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Executors of the Estate of Martin Birenbaum, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 30288; *Sylvia Barrack, as the widow of Morris Barrack, Deceased, and the First Pennsylvania Banking & Trust Company, as Executor of the Estate of Morris Barrack, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 30289.

13. *Doris A. Laister, as Executrix and as Special Administratrix of the Estate of Chester H. Laister, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-766-J; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Executors and Special Administrator of the Estate of Martin Birenbaum, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority, and United States of America*, No. 61-764-J; *Sylvia Barrack, as Special Administratrix and Administratrix with the Will Annexed of the Estate of Morris Barrack, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-763-J.

adoption would be "conducive to a race of diligence among litigants for a trial in the District Court each prefers" (364 U. S. 19, 26).

The decision of the court below gives those interested in the enforcement of a wrongful death claim an absolute choice of forum among those in which they might institute suit, and limits defendant to the one forum selected. This choice may be exercised by having an appropriate person appointed only in the jurisdiction selected and by having him bring suit there. Although there may be many districts in which jurisdiction might have been obtained over the defendant, in which venue would have been proper and in which the wrongful death claim might have been enforced, under the Court's ruling the action cannot be transferred to any of them because the nominal plaintiff thus selected had not applied for an appointment in the transferee district.

In the present cases plaintiffs have a choice of at least two forums. Under the Court's ruling, defendants are at the mercy of the plaintiffs' choice despite the provisions of Section 1404(a) and despite the principle of *Hoffman v. Blaski*, 363 U. S. 335 (1960) that Section 1404(a) may not be interpreted so as to give one party a greater choice of forums than the other.

CONCLUSION.

These cases should be reviewed by this Court because the Court's interpretation of the "might have been brought" requirement vitally affects the administration of the federal courts. It nullifies the provisions of Section 1404(a) in wrongful death and disaster litigation where its provisions are most needed and threatens to curtail the application of another important transfer statute. The Court's interpretation of Section 1404(a) conflicts in principle with the decisions of this Court and thwarts federal policy by importing rules of estate and fiduciary law which

are irrelevant to the congressional purpose. Contrary to the decisions of this Court, the ruling gives personal representative plaintiffs a choice of districts in which their actions may be brought, while defendants are restricted as a matter of law to whatever district such plaintiffs may choose. This result has been achieved by the Court's reliance on state law and supposed state policy. In view of the importance of Section 1404(a) to the administration of the federal courts, the decision of the Court of Appeals should be reviewed by this Court.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed April 6, 1962.)

VAN DUSEN, *District Judge.*

These 55 cases,[1] involving fatal and, as to three plaintiffs, non-fatal injuries suffered when an Electra airplane manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern, crashed approximately one minute after take-off in Boston Harbor on October 4, 1960, are before the court on Motions to Transfer under 28 U. S. C. A. § 1404(a). There are 114 similar cases pending in the United States District Court for the District of Massachusetts (see Document No. 30 in C. A. 30078). The record in these cases (see, particularly, statements of Lee S. Kreindler, Esq. at the argument) indicates that the primary basis for liability on which the plaintiffs presently rely is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved in this suit, as well as in engines of other

1. There are 28 plaintiffs involved in these 55 cases, since 13 plaintiffs have filed two suits in this court and 7 plaintiffs have filed three cases in this court resulting from the injuries received in the October 4, 1960, airplane accident at Boston, Mass. Only one of the 114 cases in the Massachusetts District Court is an admiralty action, whereas 7 of these cases are suits in admiralty brought by the same parties who have also filed Civil Actions in this court.

Wherever "plaintiff" is used, it includes libellants and wherever "defendants" is used it includes respondents.

One of these cases has already been transferred due to improper venue (C. A. 30307).

planes using the Logan International Airport, Boston, at about the time of the accident.

In Jurgelis v. Southern Motors Express, 169 F. Supp. 345 (E. D. Pa. 1959), this court said:

> "In Norwood v. Kirkpatrick, 1955, 349 U. S. 29, 75 S. Ct. 544, 99 L. Ed. 789, the Supreme Court, in discussing the relation of 28 U. S. C. A. § 1404(a) to the doctrine of forum non conveniens as recognized by the Supreme Court in Gulf Oil Corp. v. Gilbert, 1946, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055, said at page 32 of 349 U. S. [29], at page 546 of 75 S. Ct. [545]:
>
> "'* * *, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.'
>
> "It appears, therefore, that under the present state of the law, the factors to be considered by a court in determining whether or not to transfer the action under § 1404(a) are established by the Gulf Oil Corp. case,[2]

2. In the Gulf Oil Corp. v. Gilbert case, supra, the court said at pp. 508-509 of 330 U. S., at p. 843 of 67 S. Ct.:

"* * * An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the

and the degree of discretion to be exercised by the court is established by the Norwood case."

The last sentence quoted above was approved by Chief Judge Biggs, sitting specially in this court, in Medich v. American Oil Company, 177 F. Supp. 682, 683 (E. D. Pa. 1959). See also, All States Freight v. Modarelli, 196 F. 2d 1010 (3rd Cir., 1952), where the court said at page 1011:

> "The statute limits the privilege of the plaintiffs to have his lawsuit tried in the forum of his choosing if he can there get jurisdiction over the defendant. The purpose of the limitation is clearly to make the inevitably uncomfortable (for the litigant) judicial process cheaper and more convenient and, if possible, more prompt."

After consideration of the record in these cases, the undersigned has concluded that transfer is required under 28 U. S. C. A. § 1404(a), as follows:

I. *Convenience of the Parties*

In this case, plaintiffs claim their convenience would be served by a trial in this District and the defendants claim that it would be more convenient for them to

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balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

have these cases tried in the District of Massachusetts.[3] The burden on the survivor-plaintiffs of presenting their damage testimony in the transferee District has not been overlooked, but this is a burden often falling upon persons who, having elected to travel away from home, are involved in accidents and must have been considered by Congress in enacting 28 U. S. C. A. § 1404(a).[4] None of the affidavits allege that any of the plaintiffs is impecunious, nor is their financial condition stated in the record.

II. *Convenience of Witnesses.*

The record makes clear that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability and of degree of culpability of the defendants.[4] The Collins Affidavit (Document No.

3. There is nothing in 28 U. S. C. A. § 1404(a) which precludes transfer because the plaintiff is a resident of the transferor District. See, for example, Norwood v. Atlantic Coast Line R. R. Co., C. A. 15810, p. 4 of opinion of then Chief Judge (now Senior Judge) Kirkpatrick dated 7/12/54, petition for writ of mandamus and prohibition denied (3rd Cir., No. 11,364, on 7/16/54), aff'd. sub nom. Norwood v. Kirkpatrick, 349 U. S. 29, 75 S. Ct. 544, 99 L. Ed. 789 (1955); Harry Winston, Inc. v. Zale Jewelry Company, 191 F. Supp. 686 (S. D. N. Y. 1961); Huff v. Nashville, Chattanooga & St. Louis Ry., 88 F. Supp. 735 (S. D. N. Y. 1949). As stated in Brown v. Woodring, 174 F. Supp. 640, 645 (M. D. Pa. 1959):

"'Defendant's mandatory margin for victory * * * need not be an overwhelming one.' A court should not hesitate to disturb plaintiff's choice of forum if the three statutory factors dictate transfer."

4. The Massachusetts Death Act, in relevant part, provides:

"A person who (1) by his negligence causes the death of a person * * *, or (2) by wilful, wanton or reckless act causes death of a person * * *, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger * * *, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *. A person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the

31 in C. A. 28664) alleges that (a) all but six of the 47 eye witnesses to the accident known to General Motors reside in the District of Massachusetts and within 25 miles of Boston (par. 12);[5] (b) four of ten survivors of the crash reside in the District of Massachusetts and within 60 miles of the center of Boston;[6] (c) four employees of the Logan Airport who prepared the plane for flight reside in the vicinity of Boston; (d) seven operators of the control tower at Logan International Airport, who were eye witnesses to the aircraft's flight and crash and who would know the time of the take-off and crash, reside within 25 miles of center city Boston (see par. 15 of Document No. 31 in C. A. 28664); (e) all but one of the six experts who first examined the bodies of the dead birds reside within twelve miles of center city Boston and the sixth such expert resides in New Hampshire, approximately 60 miles from Boston (see par. 17 of Document No. 31 in C. A. 28664); and (f) five other potential witnesses having knowledge of the presence of birds at the airport, and some of whom discovered dead birds at the airport, reside within 25 miles of Boston (see pars. 16 and 18 of Document No. 31 in C. A. 28664).[7] Also,

damages shall be assessed with reference to the degree of culpability of his agents or servants." Mass. Ann. Laws, c. 229, § 2 (Suppl. 1961).

5. The second sentence of this paragraph states: "These witnesses observed the takeoff, flight and crash of the aircraft and would be able to testify to its flight path, describe the nature of its flight and crash and furnish testimony relevant to the time interval between takeoff and crash."

6. In par. 13 of this Affidavit, it is alleged that these witnesses would be able to testify as to the course of the plane's flight, the sound of its engines, and the results of the crash. In par. 4 of the unsworn answer to the Motions to Transfer filed by plaintiffs in Civil Actions Nos. 28664, 29881, 29882, 29883, 29884, 29901, 30300, 30307 and 30344 and Nos. 321, 323, 325, 327, 329, 335 and 337 of 1961 in Admiralty, it is alleged that Major Sylvester Koenig resides in Greenville, S. C. (Document No. 35 in C. A. 28664), rather than Falmouth, Mass., as alleged in this paragraph 13, but the residence of this survivor of the crash is not stated in any affidavit filed by plaintiffs.

7. The Wickenhaver Affidavit lists some of the same witnesses as those referred to above in the Collins Affidavit. See Exhibit B to

it is clear that it will be more convenient for such witnesses if there is to be one trial, rather than several, and if the discovery can be conducted under the supervision of one court.[8] Cf. MacAlister v. Guterma, 263 F. 2d 65, 68-70 (2nd Cir., 1958).

Plaintiffs have not filed any affidavits contradicting the above sworn allegations, but have emphasized, generally, without listing any additional specific witnesses in their affidavits (except for six individuals listed without specifying the area of their testimony in Document No. 35 in C. A. 28741 and five individuals listed as damage witnesses for one plaintiff in Document No. 29 in C. A. 30078), that most of their compensatory damage witnesses come from this district or near it.[9] Experience in this and other Districts indicates that, once the issues of liability have been determined, relatively few of a large group of cases such as these, resulting from one accident, go to trial on the damage issues. Furthermore, as indicated below, there are several legal hurdles the personal representative plaintiffs have to overcome before compensatory damages become pertinent in their cases.[10]

Document No. 30 in C. A. 28664. In par. 8 of that Affidavit, there is named an additional witness as to the birds living in the transferee District (John J. Phelan, of Winthrop, Mass.).

8. Since the United States of America is one of the defendants, the only District in which all the actions can be consolidated for trial is Massachusetts. See 28 U. S. C. A. § 1402(b), providing that the United States may only be sued "where the plaintiff resides or wherein the act or omission complained of occurred."

9. For example, the McConnell Affidavit (Document No. 29 in C. A. 30078) lists six compensatory damage witnesses that plaintiff Ward wishes to call "from this area" and does not deny that he was also hospitalized in the Boston area or that medical witnesses from that area could present helpful evidence on the issue of damages—see, also, Affidavits attached to Document No. 35 in C. A. 28664 and Documents Nos. 34 and 35 in C. A. 28741.

10. If agreement on damages cannot be secured in the cases against the Government, it is most probable that the Government would agree to a determination of the damage issues by this court.

Some plaintiffs also stated in their affidavits that they seek to establish that the accident occurred as the result of negligent design and testing of the engines by General Motors, negligent design and testing of the aircraft by Lockheed, negligent testing of the aircraft, as well as negligent training and physical examinations of the flight personnel, by Eastern, and negligence of the Government in execution of its responsibility for flight safety. See par. 8 of Document No. 29 in C. A. 30078. At the argument, it was admitted that plaintiffs hoped that the Government agency investigating the crash would be able to show faulty design and testing of the aircraft and its engines, but no definite finding to this effect has been made over 18 months after the crash. Hence, there is nothing specific on the record to show that any large number of witnesses from outside the Boston area, and for whom the transferor District would be more convenient than the transferee District, will be required for the trial of the above-mentioned issues of liability and degree of culpability. Employees of the defendants from California and Indiana, referred to at page 10 of the Kreindler Affidavit, being Document No. 12 in C. A. 29724, would not be substantially inconvenienced any more by a trial in Philadelphia than one in Boston,[11] but it is clear that they will be inconvenienced by having to testify at trials in both places, as opposed to one trial in Boston (see footnote 8 above, showing that the transferee District is the only place where there can be a single trial). Employees of the Civil Aeronautics Board, Bureau of Safety, will similarly have to testify in the District of Massachusetts in any event and, if the transfer of these 55 cases is denied, they will have to attend another trial in this District.

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11. A trial in this District would be less convenient for defendants since it would require them to transport their employees to testify at least twice from the west or mid-west to the eastern part of this country.

III. *The Interest of Justice.*

The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others:[8]

(1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial.

See MacAlister v. Guterma, supra, 263 F. 2d at 68-70; O'Donnell v. Watson Bros. Transportation Company, 183 F. Supp. 577 (N. D. Ill. 1960); and cases cited in those cases. With reference to the argument in the attached letter of January 11, 1962 (based on a letter from the Clerk of the Massachusetts District dated January 9, 1962, which is also attached), that "there is nothing to be gained administratively by the transfer of these matters to Boston," the United States District Court for the District of Massachusetts has informed the undersigned that all the cases arising out of this accident have been assigned to one judge, who is handling all such cases for purposes of proceedings prior to trial and will consider possibilities of severance of issues for trial, as well as consolidation for trial, at the appropriate time.[12] As pointed out in Kelly v. Greer, 295 F. 2d 18, 21 (3rd Cir., 1961), even after a consolidation order has been entered, it "does not freeze the future conduct of the litigation."

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8. See note 8 on Page 6a.

12. Paragraph 8 of the Lockwood Affidavit (Document No. 30 in C. A. 30078) refers to the normal progress of a case in the United States District Court for the District of Massachusetts, whereas the court has informed the undersigned that this case is being treated as a protracted case and not "in the normal course." See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F. R. D. 351 (1960).

(2) The conduct of as few trials as feasible on the issues of liability and culpability.

The purpose of the Federal Rules of Civil Procedure was to encourage consolidation wherever this was fair and possible. See Sutcliffe Storage & Warehouse Co. v. United States, 162 F. 2d 849, 851 (1st Cir., 1947); United States v. Knauer, 149 F. 2d 519 (7th Cir., 1945), aff'd 328 U. S. 654, 66 S. Ct. 1304, 90 L. Ed. 1500 (1946); cf. Walker v. Loop Fish & Oyster Co., 211 F. 2d 777, 780-781 (5th Cir., 1954); Howey v. Yellow Cab Co., 181 F. 2d 967, 973 (3rd Cir., 1950), aff'd sub nom. United States v. Yellow Cab Co., 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951). In the Howey case, supra, the court said at page 973:

> "Surely the stricture of the Sherwood case * * *, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge."

Federal trial courts have consistently recognized the fairness and desirability of consolidating cases for trial, particularly on the issue of liability. See Weitort v. A. H. Bull & Company, 192 F. Supp. 165 (E. D. Pa. 1961); Hassett v. Modern Maid Packers, Inc., 23 F. R. D. 661 (D. Md. 1959); Polak v. Koninklijke Luchtvaart Maatschappij, etc., 19 F. R. D. 87 (S. D. N. Y. 1956); and cases cited in those cases. In the Polak case, supra, the court said at page 88:

> "The advantages of consolidating multiple claims arising from a single accident outweigh even the considerations requiring strict enforcement of the rules on jury demand. * * * (Citing case.) Recent experience with the trial of such consolidated claims in this court indicates that almost invariably the only evidence peculiar to each claim is that relating to damages. Most

of the trial court's time is consumed by the trial issues common to all of the cases. Considerations of expense as well as the convenience of witnesses, litigants and the Court, and the expeditious dispatch of judicial business, impel consolidation under such circumstances."

In the Hassett case, supra, involving five actions arising out of one accident, the court said at page 664 of 23 F. R. D.:

> "* * * It will save time for parties, witnesses, counsel and courts, to have the entire matter disposed of at one trial. * * *
>
> "The five cases should be consolidated for trial under Rule 42(a), but, as permitted by Rule 42(b), the jury shall first hear the evidence on the issue of liability and decide that issue for all of the cases."

It is neither fair nor just that there should be a different liability result for some of these plaintiffs than there is for others. Transfers under 28 U. S. C. A. § 1404(a) have resulted from the desirability of consolidating the transferred cases for trial with other similar cases pending in the transferee District. See A/S Dampskibsselskabet Svendbord v. United States, 116 F. Supp. 603 (E. D. Tex. 1953), where the court said at page 606:

> "However, a more important consideration, it would seem, is that all of the facts and circumstances necessary to determine the rights of the parties will have to be presented both there and here at different times, and it is possible that the two Courts could reach conflicting conclusions; whereas if the case filed here is transferred, it can be consolidated with those in the Southern District of New York and all rights determined in a single trial without the possibility of such a conflict."

See, also, Continental Grain Co. v. Barge FBL-585, 364 U. S. 19, 21, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960); Cressman v. United Air Lines, 158 F. Supp. 404 (S. D. N. Y. 1958); Winsor v. United Air Lines, 153 F. Supp. 244 (E. D. N. Y. 1957).

Recently, the United States Court of Appeals for the Second Circuit has emphasized the desirability of consolidation of separate actions involving common questions of law and fact for purposes of pre-trial and trial under the supervision of one judge or master. See MacAlister v. Guterma, supra. In Crosley Corporation v. Hazeltine Corporation, 122 F. 2d 925 (3rd Cir., 1941), the United States Court of Appeals for the Third Circuit said at page 930:

> "It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. • • • The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

(3) The District of Massachusetts is the only federal jurisdiction where all defendants can be served.

The defendants (particularly the United States of America and Eastern Air Lines, Inc.) emphasized at the

argument that they wish to join the Massachusetts Port Authority (owner and operator of the Boston airport) as a third-party defendant and service can only be obtained on that entity in the District of Massachusetts (see page 4 of Kreindler Affidavit, Document No. 12 in C. A. 29724). This court has consistently recognized that the ability to join a third-party defendant in the transferee forum is a consideration in favor of transfer. See Allied Petro Products Incorporated, etc. v. Maryland Casualty Company, E. D. Pa., 201 F. Supp. 694, and cases cited at pages 695, 696. The unfairness which can result from different results in separate trials of actions arising from the same accident is illustrated in cases such as Curtis v. A. Garcia Y. Cia, 272 F. 2d 235 (3rd Cir., 1959), where differing records in two trials produced a liability result for defendant and third-party defendant which it is quite possible that neither fact finder would have reached if both actions had been considered at the same trial.

(4) Other reasons favoring transfer of the ca[illegible] in the interest of justice.

In addition to the above factors favoring the transferee District as the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had, the following factors mentioned by the United States Supreme Court in Gulf Oil Corp. v. Gilbert (see second paragraph quoted in footnote 2, supra) favor trial in the transferee District:

(a) The litigation will be handled "at its origin," rather than in this court, the docket of which is more congested than that of the transferee District (see par. 7 of Wickenhaver Affidavit, being Exhibit B to Document No. 31).

(b) The trial of the issues of liability and culpability will be held "in a forum that is at home with the state law."

One of the principal arguments of the personal representative plaintiffs who oppose the transfer is that they will be deprived of the benefits of the public policy embodied in the Pennsylvania Constitution (particularly Article I, Section 11, and Article III, Section 21, P. S.) if these cases are transferred. Cf. § 612 of Restatement of Conflicts of Law. This argument against transfer is rejected for these reasons, among others:

A. There is no reason to believe that a Federal Judge, sitting in Massachusetts, will not be just as able in selecting and interpreting the applicable law as such a judge sitting in Pennsylvania will be.

The Supreme Court of the United States has recently stated: "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties." Richards v. United States, 369 U. S. 1, 82 S. Ct. 585 (1962).[13] In view of the possibility that the decision in the cases pending in the Pennsylvania State Courts referred to under B below may make moot the argument against application of the above-quoted rule in this case, it is not necessary to decide at this time such questions argued by counsel as the application to this situation of §§ 384, 391 (comment d), 412, 517 and 612 of the Restatement, Conflict of Laws, and as, when a case is transferred under 28 U. S. C. A. § 1404 (a), does the transferee court determine the rights of the parties on the basis of the law that would have been applied in the District where the suit was originally filed. See Hendrick v. Atchison, T. & S. F. Ry. Co., 182 F. 2d 305, 309-310 (10th Cir., 1950); Gomez v. The SS. Dorothy, 183 F.

13. It is noted that in referring to the rule of some states "to take into account the interests of the State having significant contact with the parties to the litigation," the court did not refer to any Pennsylvania or Massachusetts cases in footnote 26 of its opinion (see page 12 of 369 U. S., page 592 of 82 S. Ct.).

Supp. 499, 512 (D. Puerto Rico 1959); Hargrove v. Louisville & Nashville Railroad Company, 153 F. Supp. 681, 684 (W. D. Ky. 1957); Greve v. Gibraltar Enterprises, 85 F. Supp. 410, 414 (D. New Mex. 1949);[14] and authorities cited in those cases. The transferee court will be better able to pass on these questions, if necessary, after decision of the cases pending in the Pennsylvania State Courts mentioned in footnote 20 below.

B. Contention that Pennsylvania public policy prevents enforcement of the measure of recovery, but accepts the right of action provided in the Massachusetts Wrongful Death Act should not be ruled upon at this time.

Relying on (1) a recent dictum of four out of seven justices of the New York Court of Appeals in Kilberg v. Northeast Air Lines, Inc., 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, 172 N. E. 2d 526 (1961), to support the application of Article 3, § 21, of the Pennsylvania Constitution,[15] (2) an

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14. In this case, the court used this language at page 414 of 85 F. Supp.:

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a change of venue affects the place of trial only."

15. Article 3, § 21, provides:

"* * * in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Article 1, § 16, of the New York Constitution, relied on in the Kilberg case, supra, provides: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations." It is noted that in view of the reasoning used to support the majority's dictum in the Kilberg case, the same result might not be applicable to defendants such as Lockheed and General Motors, which are not common carriers who sold tickets in the forum to domiciliaries or residents of the forum.

older Pennsylvania Supreme Court case [Thirteenth & Fifteenth St. Passenger Railway Co. v. Boudrou, 92 Pa. 475, 481-482 (1880)] to support the application of Article 1, § 11, of the Pennsylvania Constitution,[16] and (3) general language in Pennsylvania cases that foreign penal statutes will not be enforced in Pennsylvania courts,[17] the personal representative plaintiffs contend that they are entitled to recover compensatory damages without limit in these actions because of the alleged, strong Pennsylvania public policy opposed to the $20,000. limit in the Massachusetts Wrongful Death Act. Defendants argue that neither the Pennsylvania appellate court nor the Federal decisions have applied such a public policy to invalidate such foreign state limitations on recovery in the past. See, for example, Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904); Knecht v. United States, 242 F. 2d 929 (3rd Cir., 1957); Rennekamp v. Blair, 375 Pa. 620, 101 A. 2d 669 (1954); cf. Hughes v. Pennsylvania Railroad Co., 202 Pa. 222, 228-229, 51 A. 990, 63 L. R. A. 513 (1902); and Quaker Worsted Mills Corp. v. Howard Truck

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16. Article 1, § 11, of this Constitution provides:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

17. Nesbitt v. Clark, 272 Pa. 161, 116 A. 404, 25 A. L. R. 1406 (1922); Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 A. 1085 (1909). Although language in Massachusetts Bonding & Ins. Co. v. United States, 352 U. S. 128, 132, 77 S. Ct. 186, 1 L. Ed. 2d 189 (1956), is relied on to establish that the Massachusetts Wrongful Death Act is penal, the Pennsylvania appellate courts have recognized that the words "penal" and "penalty" have different shades of meaning. See Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 146 A. 2d 714 (1958); Laughlin et al. v. Baltalden, Inc., 191 Pa. Super. 611, 617-618, 159 A. 2d 26 (1960); cf. Ward v. Rice, 29 F. Supp. 714 (E. D. Pa. 1939). The Pennsylvania appellate courts have also recognized that there is a strong public policy in enforcing rights and duties validly created by foreign law. See Personal Finance Co. of New York v. General Finance Co., 133 Pa. Super. 582, 585-586, 3 A. 2d 174 (1938).

ing Corp., 131 Pa. Super. 1, 8-9, 198 A. 691 (1938).[18] Also, defendants contend that the full faith and credit clause requires Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, relying on First Nat. Bank of Chicago v. United Air Lines, 342 U. S. 396, 400-401, 72 S. Ct. 421, 96 L. Ed. 441 (1952); Order of United Commercial Travelers v. Wolfe, 331 U. S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687 (1947); Bradford Electric Co. v. Clapper, 286 U. S. 145, 160, 52 S. Ct. 571, 76 L. Ed. 1026 (1932). Finally, defendants argue that if this Massachusetts Act may not be applied in these cases, there can be no recovery at all, since the plaintiffs have no remedy.

However, in accordance with the repeated statements of the Supreme Court of the United States that District Courts should abstain from deciding issues involving the Constitution and public policy of a state so as to afford the state courts a reasonable opportunity to decide such matters,[19] the determination of the law governing the measure

18. In the Hughes case, the court used this language at pp. 228-229 of 202 Pa., at p. 992 of 51 A.:

"Where a contract containing a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. If such a contract comes under construction in a state like Pennsylvania, whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in Forepaugh v. Railroad Co., [128 Pa. 217, 18 A. 503, 5 L. R. A. 508] and in Fairchild v. Railroad Co., [148 Pa. 527, 24 A. 79]. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett v. Railroad Co., [176 Pa. 45, 34 A. 972]. In the Fairchild Case, as the injury occurred in Maryland, this court enforced the law of that state. If the injury to the horse had been delayed until in the course of the journey it had reached Pennsylvania, our own law of public policy would have controlled."

This approach seems different than the New York law, as exemplified in the Conklin case, relied on in the majority opinion in Kilberg at page 135 of 211 N. Y. S. 2d, at page 528 of 172 N. E. 2d.

19. See Harrison v. N. A. A. C. P., 360 U. S. 167, 176-178, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959); Louisiana Power & Light Co. v. Thibodaux City, 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058

of damages in these actions should be postponed until the trial on the issues of liability and culpability has been completed. Meanwhile, a Pennsylvania appellate court decision may become available to enlighten us on the public policy of this Commonwealth in this situation, since there are two cases pending in the state courts in which there will be an opportunity for the foregoing contention to be submitted to the Pennsylvania courts.[20]

Abstention of decision on this aspect of the case at this time will also prevent a premature decision on the Constitutional issue of the application of the full faith and credit clause.[21] Cf. Railroad Commission of Texas v.

(1959); and cases cited in Note, "Abstention: An Exercise in Federalism," 108 U. of Pa. Law Rev. 2226 (1959). In the Thibodaux case, the court said at page 27, 79 S. Ct. at page 1072: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." In the Harrison case, the court said at page 176 of 360 U. S., at page 1029 of 79 S. Ct.:

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U. S. 521, 525, [52 S. Ct. 217, 219, 76 L. Ed. 477] as their 'contribution * * * in furthering the harmonious relation between state and federal authority. * * *'"

20. It is noted that two actions previously pending in this court (C. A. Nos. 30390 and 30391) have been remanded to the state court and are now pending there (Court of Common Pleas No. 4 of Philadelphia County, Sept. Term 1961, No. 237, and Court of Common Pleas No. 6 of Philadelphia County, Sept. Term 1961, No. 238).

21. Also, it is noted that the application of the Full Faith & Credit Clause (article 4, § 1) to the dictum of the majority in the Kilberg case is raised by an appeal now pending in the United States Court of Appeals for the Second Circuit from Pearson, etc. v. Northeast Airlines, Inc., 201 F. Supp. 45, in the U. S. District Court for the Southern District of New York, Opinion and Order filed 11/15/61. Counsel have informed the court that the New York District Court reached a contrary decision to Pearson, supra, in Trauth v. Northeast Airlines, Inc., (S. D. N. Y., C. A. 149-256,

Pullman Co., 312 U. S. 496, 501, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

Finally, it should be noted that the considerations stated in 28 U. S. C. A. § 1404(a) require the transfer of the actions brought against the Government for these reasons, among others:

(a) The basis of the claims against the Government makes it only fair that it be permitted to bring in as a third-party defendant the Massachusetts Port Authority, as operator of the airport.

(b) The District of Massachusetts is the only District where all the suits against the Government may be brought (see footnote 8 above);

(c) The Massachusetts Federal Court is most familiar with "the whole law of the State where the act or omission occurred" which must be applied in the suits against the Government, see Richards v. United States, supra, at page 1 of 369 U. S., at page 585 of 82 S. Ct.; and

(d) There is no contention that the above-mentioned public policy contained in the Pennsylvania Constitution applies to these Government suits, which are not governed by the measure of damages in the Massachusetts Wrongful Death Act.

The many factors dictating transfer of the cases against the Government (19) [22] must be considered as a factor

1961), where a New Jersey citizen was plaintiff, on the ground that New Jersey's policy differed from that of New York. An excerpt from the transcript of the court's statements in Trauth, supra, is appended to the attached letter of 1/9/62 from counsel for General Motors.

22. Civil Actions Nos. 28764, 28788, 28789, 29100, 29161, 29162, 29275, 29616, 29901, 30230, 30257, 30258, 30263, 30302, 30303, 30304, 30305, 30306 and 30343.

favoring transfer of the other cases pending in this District, so that all cases arising from this accident may be treated uniformly by the court which must dispose of the great majority of such cases.

Plaintiffs in C. A. 30078, C. A. 30346 and C. A. 30284 contend that these wrongful death actions may not be transferred under 28 U. S. C. A. § 1404(a) since they were not appointed as personal representatives in Massachusetts and, hence, could not have brought the actions there,[23] relying on Hoffman v. Blaski, 363 U. S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960). However, the Supreme Judicial Court of Massachusetts has held that a foreign personal representative may bring a suit under the wrongful death act and later qualify in the forum,[24] even though the Statute of Limitations has run at the time of such later qualification,[25] in Boudreau v. New England Transportation Company, 315 Mass. 423, 426-427, 53 N. E. 2d 92, 94, where the court said:

> "Even apart from any admission under G. L. (Ter. Ed.) c. 231, § 30, this is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured."

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23. See Boutillier v. Wesinger, 322 Mass. 495, 496, 78 N. E. 2d 195 (1948).

24. See Mass. Gen. Laws, Ch. 193, §§ 1 & 2, Ch. 194, § 5, Ch. 195, § 8, Mass. Ann. Laws, Ch. 204, § 3.

25. Cf. Brennan v. Rooney, 139 F. Supp. 484, 486-487 (E. D. Pa. 1956).

Although this is a close question, this contention of plaintiffs is rejected for these reasons:

A. The District of Massachusetts is a District where Congress designated litigation of this type might be brought.

The appropriate Congressional Title of the United States Code (Title 28 covering "Judiciary and Judicial Procedure") provides in Chapter 85 (District Courts; Jurisdiction) at Section 1332(a) and in Chapter 87 (District Courts; Venue) at Sections 1391(a) and (c) and 1402(b) for institution of these actions in the District of Massachusetts.

In determining where a suit might have been brought, the dissenting opinion in Paramount Pictures v. Rodney, 186 F. 2d 111, 116 (3rd Cir. 1951), which was quoted with approval in Hoffman v. Blaski, supra, 363 U. S. at 343, 80 S. Ct. at 1089, states:

> "The district judge * * * had to decide whether the Northern District of Texas was a place where the suits 'might have been brought.' A reasonable and obvious way of determining this was to see whether Congress in some other statute had designated the places where litigation of this sort might be brought.
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> * * *
>
> "This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation." (pp. 116 and 118)

B. A "common-sense approach" in interpreting Section 1404(a) of Title 28 to accomplish its purposes requires a construction that these cases "might have been brought" in the District of Massachusetts. See Continental Grain Co. v. Barge FBL-585, supra.

For the reasons stated above, it is "in the interest of justice" and "for the convenience of * * * witnesses" that these actions be transferred to the District of Massachusetts. Under such circumstances, legal fictions such as the state which has authorized a personal representative to act should not be a basis for rejecting the use of 28 U. S. C. A. § 1404(a). See Continental Grain Co. v. Barge FBL-585, supra, 364 U. S. at 22-24, 80 S. Ct. at 1472, 1473. In distinguishing Hoffman v. Blaski, supra, the court said at page 22 of 364 U. S., at page 1472 of 80 S. Ct. of the Barge FBL-585 case:

> "Those cases involved transfers in which the plaintiffs filing the suits would have had no right whatever to proceed originally against the defendants on the 'civil actions' in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the grain company to subject the owner of the barge, with or without its consent, to a 'civil action' in Memphis at the time the New Orleans action was brought."

In applying 28 U. S. C. A. § 1404(a), courts do not consider all the defenses which might have been, or be, raised in the transferee forum and decide whether an action might have been successfully brought there.[26] See Greve v. Gibraltar Enterprises, supra, 85 F. Supp. at 412-413; cf. Ackert v. Pelt Bryan, 299 F. 2d 65 (2nd Cir. 1962).

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26. It is noted that "It is not necessary to aver the capacity of a party to sue or * * * the authority of a party to sue * * * in a representative capacity * * *" but such matters must be raised "by specific negative averment * * *." See F. R. Civ. P. 9(a), 28 U. S. C. A.

The defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions. See Greve v. Gibraltar Enterprises, supra, 85 F. Supp. at 414.[27]

27. There are attached to this opinion letters from counsel dated January 9, January 11, January 12 and February 14 with enclosures (including copy of letter of January 9, 1962, from the Clerk of the U. S. District Court for the District of Massachusetts, which was enclosed with the letter of January 11).

APPENDIX B.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed November 19, 1962.)

Before STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

By STALEY, *Circuit Judge*.

Petitioners seek writs of mandamus or prohibition directing respondent to vacate and set aside his order transferring these actions to the United States District Court for the District of Massachusetts. The order was entered pursuant to § 1404(a) of 28 U. S. C.,[1] but has been stayed pending the disposition of these petitions.

The actions arise out of the crash of an Eastern Air Lines Electra airplane in Boston Harbor on October 4, 1960. These suits were filed in the District Court for the Eastern District of Pennsylvania by two survivors of the crash and by the personal representatives of several deceased passengers. Named as defendants were Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corp., and in several instances, the United States. On April 6, 1962, respondent entered an order granting defendants' motions for transfer pursuant to an opinion filed that same day.[2]

With respect to the death actions, petitioners assert that respondent was without power to enter the order of transfer because the Massachusetts District Court is not a district where these actions "might have been brought" within the meaning of § 1404(a). Additionally, they argue

1. "§ 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. § 1404(a) (1958 ed.).

2. The opinion is reported at 204 F. Supp. 426.

that because the transferee forum may apply a different rule of substantive law to these suits,[3] the order should be vacated as a matter of law. Lastly, they contend that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have power to transfer these actions, we find it unnecessary to consider petitioners' alternative arguments.

At the outset, we are faced with defendant-intervenors' contention that the petitions for writs of mandamus or prohibition are inappropriate in these circumstances. It must be noted that respondent does not join in presenting this argument.

Our recent decision in Swindell-Dressler Corp. v. Dumbauld, — F. 2d — (C. A. 3, 1962), makes it abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a). However, intervenors urge that petitioners had an adequate remedy of appeal under the provisions of the Interlocutory Appeals Act, 28 U. S. C. A. § 1292(b).[4] But that very issue

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3. The Massachusetts Death Act provides in relevant part:

"A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *." Mass. Ann. Laws, C. 229, § 2. It has been held to be punitive in nature. Massachusetts Bonding & Ins. Co. v. United States, 352 U. S. 128 (1956).

4. "§ 1292. Interlocutory decisions

* * *

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *." 28 U. S. C. § 1292(b) (1958 ed.).

was squarely raised in *Swindell-Dressler* and was decided in the negative.[5] We, therefore, conclude that these petitions are properly before us.

On the merits, petitioners contend that because the personal representatives in the death actions have not obtained ancillary appointment in Massachusetts, they lack capacity to bring the actions in that state, and thus § 1404 (a) does not authorize transfer to that district. Initially, reference is made to Rule 17(b) of the Federal Rules of Civil Procedure, which provides in relevant part: "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *."

Next, petitioners point out that under the law of Massachusetts a personal representative appointed in another state is not thereby qualified to maintain suit in Massachusetts, Boutillier v. Wesinger, 322 Mass. 495, 78 N. E. 2d 195 (1948), and that appointment as an ancillary or special administrator is in the discretion of the Massachusetts probate judge, Mass. Ann. Laws, C. 193, § 10. Finally, the Supreme Court's decision in Hoffman v. Blaski, 363 U. S. 335 (1960), is cited as being dispositive of the issue before us.

In *Hoffman*, the district court in which suit had been properly brought transferred it to a district which did not have venue of the cause. The Supreme Court, affirming the judgment of the Seventh Circuit, held that this defect precluded transfer. The phrase "where it might have been

5. As we indicated in Milbert v. Bison Laboratories, Inc., 260 F. 2d 431, 433 (C. A. 3, 1958), a portion of the legislative history of § 1292(b) would appear to support intervenors' contention. However, as we there pointed out, the district judge's written statement in the order, conforming to the language of the statute, is an essential condition precedent before we may even entertain an application for permission to appeal. Here, respondent, being fully aware of the provisions of § 1292(b), failed to include such a statement in his order. Moreover, as heretofore indicated, he has expressly dissociated himself from intervenors' argument as to the availability of § 1292(b) and the propriety of mandamus.

brought" was construed as applying to the time when suit was originally instituted. With respect to the argument that the venue defect had been waived by the defendant's motion to transfer, the Court said, "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." 363 U. S. at pp. 343-344.

Respondent and intervenors would limit the holding in Hoffman v. Blaski, supra, to the requirement that the transferee forum have both venue and jurisdiction of the cause. They state that the existence of other potential defenses does not preclude removal, and cite several cases in which transfer has been effected although the suits would have been barred by the statute of limitations applicable in the transferee district.[6] Additionally, they argue that the phrase "the action" does not include the parties to the action.

We think that the holding in Hoffman v. Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is

6. H. L. Green Co. v. McMahon, — F. 2d.— (C. A. 2, 1962); Headrick v. Atchison, T. & S. F. Ry., 182 F. 2d 305 (C. A. 10, 1950); Gomez v. S. S. Dorothy, 183 F. Supp. 499 (D. Puerto Rico, 1959); Crawford v. S. S. Shirley Lykes, 148 F. Supp. 958 (S. D. N. Y. 1957); Curry v. State Marine Corp. v. Delaware, 118 F. Supp. 234 (S. D. N. Y. 1954); Frechoux v. Lykes Bros. S. S. Co., 118 F. Supp. 234 (S. D. N. Y. 1953); Greve v. Gibralter Enterprises, 85 F. Supp. 410 (D. N. M. 1949). Six of these seven cases antedate Hoffman v. Blaski, supra. Moreover, the decisions in all seven were based upon the legal conclusion that the statute of limitations of the state of the transferor district would apply.

beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from Hoffman v. Blaski, supra. Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman*. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there.

A similar conclusion was reached in Felchlin v. American Smelting and Refining Co., 136 F. Supp. 577 (S. D. Calif. 1955). There, suit was filed by California executors, and the defendant moved to dismiss or, in the alternative, to transfer the suit to the Western District of Texas. The court held that because Texas forbids suits by foreign executors, the proposed transferee forum was not a district "where the action might have been brought." Accordingly, the motion was denied.

Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue.

The transfer sanctioned in Continental Grain Co. v. Barge FBL-585, 364 U. S. 19 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law.

The attempted differentiation between "the action" and the parties thereto is based on the language of Rules 13(h), 24, and 25(b) and (c) of the Federal Rules of Civil Procedure. We think it without merit. These rules refer to the addition, intervention, or substitution of parties to a law suit which has already been instituted. Thus, they necessarily make separate reference to the action and the parties to the action. More important, to say that the action and the parties thereto are separate and distinct is to ignore reality, for the identity of the parties is determinative of such basic matters as jurisdiction and venue.

The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court. Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of these petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in *Hoffman*, petitioners did not have an independent right to maintain suit in Massachusetts.

Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The short answer to this is that by the use of the phrase "where it might have been brought" Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17(b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman v. Blaski, supra,

i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district.

Of course, our holding that the district court was without jurisdiction to transfer these suits relates only to the death actions. However, in light of this opinion the district court may wish to reconsider the transfer of the two personal injury suits, particularly as the death actions, which constitute the great majority of these suits, will now be tried in the Eastern District of Pennsylvania.

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside.

We assume that it will not be necessary to issue the writ unless a petition for certiorari is filed, and that the district court will vacate the order of transfer in accordance with this opinion.

APPENDIX C.

ORDER DATED DECEMBER 7, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,994

ROBERTA BARRACK, ADMX., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

SIDNEY W. POPKIN, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

HOWARD H. RAPP, ADMR., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,011

LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,033

DORIS A. LAISTER, EXTRX., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

Present: STALEY and FORMAN, *Circuit Judges,* and LANE, *District Judge.*

Upon consideration of the petitions for writs of mandamus or prohibition, of the answers by respondent and of the briefs, and after hearing:

It is ORDERED, ADJUDGED and DECREED by this Court that the prayers of the petitions be and the same hereby are granted and the Clerk of this Court is hereby directed to issue the writs of mandamus in accordance with the opinion of this Court.

By THE COURT,

STALEY,
Circuit Judge.

Dated:
December 7, 19

WRIT OF MANDAMUS ISSUED DECEMBER 14, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,994

BARRACK, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,003

RAPP, ADMINISTRATOR, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

Peremptory Writ of Mandamus.

UNITED STATES OF AMERICA, THIRD JUDICIAL CIRCUIT *ss.:*

To the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, GREETINGS:

WHEREAS, the Honorable Francis L. Van Dusen by order filed April 6, 1962 transferred to the United States District Court for the District of Massachusetts Civil Actions brought against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation and Civil Actions brought against the United States, a copy of which order is attached to this writ and marked Exhibit "A"; and

WHEREAS, the plaintiffs in the actions ordered to be transferred have filed petitions for writs of mandamus and prohibition directing the respondent to vacate and set aside his order of transfer; and

WHEREAS, the respondent has filed answers to the petitioners; and

WHEREAS, the matter came on to be heard before this Court on the aforesaid petitions, answers and briefs; and

WHEREAS, after due deliberation thereon this Court rendered its opinion November 19, 1962, that the Honorable Francis L. Van Dusen exceeded his authority when he

entered the order of transfer on April 6, 1962, with respect to the civil actions in the death cases; and

WHEREAS, on December 7, 1962 this Court caused to be entered herein its order, directing the Clerk of this Court to issue the writ of mandamus and prohibition in accordance with the opinion of the Court;

NOW, THEREFORE, THE RESPONDENT, THE HONORABLE FRANCIS L. VAN DUSEN IS HEREBY REQUIRED AND COMMANDED, immediately after the receipt of this writ, and without delay to vacate and set aside the order of April 6, 1962 in the civil actions enumerated in Exhibit "B" attached to this writ.

IDA O. CRESKOFF,
Clerk of the United States Court of Appeals for the Third Circuit.

Dated: December 14, 1962.

Exhibit "A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SIDNEY W. POPKIN v. EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP, and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C. A. 28664) and 11/1/61 (Document No. 7 in C. A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions	CIVIL ACTIONS Nos. 28664 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346

ORDER SUR MOTIONS TO TRANSFER

(Documents Nos. 28, 29 & 30 in C. A. 28664; Nos. 30, 31 & 32 in C. A. 28741; Nos. 23, 24 & 25 in C. A. 28762; Nos. 26, 27 & 28 in C. A. 28763; Nos. 13 & 15 in C. A. 28764; Nos. 13 and 15 in C. A. 28788; Nos. 13 & 15 in C. A. 28789; Nos. 22, 23 & 24 in C. A. 29099; Nos. 12 & 14 in C. A. 29100; Nos. 22, 23 & 24 in C. A. 29159; Nos. 22, 23 & 24 in C. A. 29160; Nos. 11 & 13 in C. A. 29161; Nos. 11 & 13 in C. A. 29162; Nos. 22, 23 & 24 in C. A. 29274; Nos. 12 & 14 in C. A. 29275; Nos. 20, 21 & 22 in C. A. 29615; Nos. 9 & 11 in C. A. 29616; No. 9 in C. A. 29724; Nos. 15, 16 & 17 in C. A. 29768; Nos. 15, 16 & 17 in C. A. 29881; Nos. 15, 16 & 17 in C. A. 29882; Nos. 15, 16 & 17 in C. A. 29883; Nos. 15, 16 & 17 in C. A. 29884; Nos. 8 & 11 in C. A. 29901; Nos. 21, 22 & 23 in C. A.

30078; Nos. 20, 21 & 22 in C. A. 30079; Nos. 11, 12 & 13 in C. A. 30200; No. 7 in C. A. 30230; No. 2 in C. A. 30258; Nos. 12, 13 & 14 in C. A. 30260; No. 2 in C. A. 30263; Nos. 9, 10 & 13 in C. A. 30266; Nos. 15, 16 17, & 24 in C. A. 30284; No. 6 in C. A. 30288; No. 6 in C. A. 30289; Nos. 13, 14 & 15 in C. A. 30300; Nos. 13, 14 & 15 in C. A. 30301; No. 11 in C. A. 30302; No. 4 in C. A. 30303; No. 2 in C. A. 30304; No. 11 in C. A. 30305; No. 2 in C. A. 30306; No. 12 in C. A. 30843; Nos. 13, 14 & 15 in C. A. 30344; Nos. 15, 16 & 17 in C. A. 30846)

AND NOW, April 6, 1962, IT IS ORDERED that the above-captioned cases are TRANSFERRED to the United States District Court for the District of Massachusetts pursuant to 28 U. S. C. A. § 1404(a).

/s/ Francis L. Van Dusen
J

CA. 30303

See Opinion filed earlier today.

CA 30304 The record indicates that this case should also be transferred due to improper venue in this District.

In this action, the Motion to Dismiss (Document No. 4) is being treated as an alternative Motion to Transfer in order to avoid precluding the plaintiff from recovering, and the District of Massachusetts is considered a more appropriate forum to which to transfer the case than the Middle District of Pennsylvania for the reasons stated in the above Opinion.

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Exhibit "B"

C. A. No. 28762

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28763

Henry C. Gransden, Admr. of the Estate of
Henry V. Gransden, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28788

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 28789

Henry C. Gransden, Admr. of the Estate of
Henry V. Gransden, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29099

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29100

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

United States of Ameriea

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29159

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29160

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29161

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29162

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29274

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29275

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29615

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29616

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 29724

Doris A. Laister, as Execx. of the Estate of Chester H. Laister, deceased

v.

Eastern Air lines, Inc.

C. A. No. 29768

Leah Biernbaum and Dewey Hoffman, Executors of the Estate of Leonard Biernbaum, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29881

Edna E. Long and Laura Manney, Admrxs. of the Estate of Shirley E. Reitz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29882

Mary B. Grice, Execx. of the Estate of
David S. Grice, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29883

Dorothy Weinstein, Execx. of the Estate of
Ralph Weinstein, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29884

Diane Braff, Admrx. ad prosequendum and as
General Admrx. of the Estate of Bernard
Jay Braff, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30078

Howard H. Rapp, Admr. of the Estate of
Richard F. Zeller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30200

Joyce J. Wright, Admrx. of the Estate of
John Allen Wright, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30230

Joyce J. Wright, Admrx. of the Estate of John Allen Wright, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc.

C. A. No. 30258

Ronald London, Admr. C. T. A. of the Estate of Phillip London, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 30260

Ronald London, Admr. of the Estate of Philip London, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30263

Ruth Staller, Admrx. of the Estate of Philip Staller, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 30266

Ruth Staller, Admrx. of the Estate of
Philip Staller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30284

Nancy A. Frankenfield, Admrx. of the Estate
of George B. Frankenfield, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30288

Selma Birenbaum, Abe Birenbaum and Abram P.
Piowsky as Executors of the Estate of
Martin Birenbanm, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 30289

Sylvia Barrack as the widow of Morris
Barrack, deceased and the First Pennsylvania
Bank and Trust Company, as Executors of the
Estate of Morris Barrack, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 30301

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, Co-Executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30302

Mary B. Grice, Execx. of the Estate of David S. Grice, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 30305

Dorothy Weinstein, Execx. of the Estate of Ralph Weinstein, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 30306

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, co-executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 30343

Joseph Thompson, Jr., Admr. of the Estate of Letha Mae Thompson, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., Third Pty. Deft.

C. A. No. 30344

Joseph Thompson, Jr., admr. of the Estate of Letha Mae Thompson, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30346

Donald A. Scott, Admr. of the Estate of Thomas L. Moody, Deceased

v.

Eastern Air Lines, Inc., et al.